Dato' Dr Muhammad Ridzuan bin Mohd Salleh & Anor v Syarikat Air Terengganu Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC(ARB)-39 OF 2010/2011
LEE SWEE SENG JC
14 MARCH 2012

Arbitration — Arbitrator — Appointment — Dispute concerning project of joint-venture company — Bank financed project — Failure of arbitrator to disclose to parties appointment as director and credit review committee member in financier bank — Whether appointment gave rise to justifiable doubt about arbitrator's impartiality and independence — Whether parties denied of right to challenge arbitrator's continued umpiring of proceedings — Whether sufficient grounds to set aside arbitral awards and enforcement order

The first plaintiff and the defendant entered into a joint venture to set up the second plaintiff to undertake a project to bottle and sell reverse osmosis water. The defendant was to buy the bottled water from the second plaintiff pursuant to a water purchase agreement. In consideration for Malayan Banking Bhd ('MBB') providing a RM2.3m facility to finance the project, the first plaintiff charged two pieces of its land in MBB's favour and guaranteed repayment of the facility. A dispute which arose over an alleged breach of the water purchase agreement was referred for arbitration before a sole arbitrator who, prior to his appointment in that capacity, signed a statement as to his impartiality and independence as required by the rules of the Kuala Lumpur Regional Centre for arbitration. Mid-way through the arbitration proceedings the parties negotiated a settlement on the arbitrator's advice, withdrew their claims against each other and recorded a consent award and a consent order on costs payable by the plaintiffs to the defendant. The defendant proceeded to register and enforce the award on costs. Unknown to the plaintiffs, the arbitrator, after the proceedings had started and before he had made the awards, was appointed as a non-independent non-executive director and member of the credit review committee in MBB. The arbitrator did not disclose this fact to the parties. When the plaintiffs came to know of it they filed the instant application to set aside the consent award, the award on costs and the enforcement order on the award for costs issued by the High Court. The plaintiffs claimed the arbitrator's failure to disclose his appointments in MBB breached the rules of natural justice as they, if they had known of that fact earlier, would have asked the arbitrator to recuse himself or challenged his appointment. The defendant said the arbitrator's appointments in MBB should not affect the arbitration awards and orders as they were made pursuant to the consent of the parties.

Held, setting aside the awards and the enforcement order and ordering each party to bear their own costs:

(1) The arbitrator had a continuing duty of disclosure until the conclusion of the arbitral proceedings to disclose his appointments in MBB. The fact that MBB was financier of the project was sufficient nexus compelling disclosure. It was a nexus that raised the likelihood of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality and independence (see para 28).

(2) What was necessary to trigger disclosure was a mere 'justifiable doubt' or 'reasonable suspicion', and not a finding or certainty, of the lack of impartiality and independence on the arbitrator's part (see para 30).

(3) What was not given to the parties, more particularly the plaintiffs, was the right to decide whether or not to challenge the arbitrator's continuing arbitration on the ground there was a likelihood he might not be impartial or independent (see para 35).

(4) The enforcement order was liable to be set aside as the arbitrator's continuing to act in that capacity after becoming aware of a circumstance that might give rise to justifiable doubt as to his impartiality or independence struck at the very issue of a lack of jurisdiction. The fresh evidence of his appointments in MBB was also not available to the plaintiffs when the enforcement order was made (see paras 52 & 59).

[Bahasa Malaysia summary

Plaintif pertama dan defendan telah memasuki satu usaha sama menubuhkan plaintif kedua untuk melaksanakan projek pembotolan dan penjualan air osmosis berbalik. Defendan sepatutnya membeli air botol itu daripada plaintif kedua menurut perjanjian jualan air itu. Sebagai balasan untuk Malayan Banking Bhd ('MBB') memberikan kemudahan RM2.3 juta untuk membiayai projek itu, plaintif pertama telah mencagarkan dua bidang tanahnya dengan MBB dan memberi jaminan bayaran balik kemudahan itu. Pertikaian yang timbul berhubung pelanggaran perjanjian jualan air yang dikatakan itu telah dirujuk kepada timbang tara di hadapan seorang penimbang tara yang, sebelum pelantikan beliau dalam kapasiti tersebut, telah menandatangani kenyataan berhubung kesaksmaan dan kebebasan beliau seperti mana dikehendaki oleh peraturan-peraturan Pusat Serantara Timbangtara Kuala Lumpur. Semasa penimbang prosiding timbang tara itu pihak-pihak telah berunding untuk satu penyelesaian atas nasihat tara, dan telah menarik balik tuntutan-tuntutan mereka antara satu sama lain dan merekodkan award persetujuan dan perintah persetujuan dengan kos yang perlu dibayar oleh plaintif-plaintif kepada defendan. Defendan telah mendaftar dan menguatkuasakan award dengan kos itu. Tanpa pengetahuan plaintif-plaintif, penimbang tara, selepas prosiding itu telah bermula dan sebelum beliau membuat award, telah dilantik sebagai pengarah bukan bebas bukan eksekutif

dan ahli jawatankuasa semakan kredit dalam MBB. Penimbang tara tidak mendedahkan fakta ini kepada kedua-dua pihak. Apabila plaintif-plaintif mendapat tahu tentangnya mereka telah memfailkan permohonan untuk mengetepikan award persetujuan itu, award untuk kos dan perintah penguatkuasaan atas award untuk kos yang dikeluarkan oleh Mahkamah Tinggi. Plaintif-plaintif mendakwa kegagalan penimbang tara mendedahkan pelantikan beliau dalam MBB telah melanggar rukun keadilan asasi kerana mereka, jika telah mengetahui tentang fakta itu lebih awal, akan bertanyakan penimbang tara untuk menarik diri atau mencabar pelantikan beliau. Defendan menyatakan pelantikan penimbang tara dalam MBB tidak patut menjejaskan award-award penimbang tara kerana telah dibuat menurut persetujuan pihak-pihak.

Diputuskan, mengetepikan award-award dan perintah penguatkuasaan dan memerintahkan setiap pihak menanggung kos sendiri:

(1) Penimbang tara mempunyai kewajipan pendedahan berterusan sehingga keputusan prosiding timbang tara untuk mendedahkan pelantikan beliau dalam MBB. Fakta bahawa MBB adalah pembiaya projek itu menunjukkan kaitan mencukupi untuk membuat pendedahan. Ia merupakan kaitan yang menimbulkan kebarangkalian keadaan yang boleh menimbulkan keraguan tentang keadilan dan kebebasan penimbang tara (lihat perenggan 28).

(2) Apa yang perlu untuk menyebabkan pendedahan hanyalah 'justifiable doubt' atau 'reasonable doubt', dan bukan penemuan atau kepastian, tentang kesaksamaan dan kebebasan yang tidak mencukupi di pihak timbang tara (lihat perenggan 30).

(3) Apa yang tidak diberikan kepada pihak-pihak, khususnya plaintif-plaintif, adalah hak untuk memutuskan sama ada hendak atau tidak untuk mencabar penimbang tara kerana meneruskan tara atas alasan terdapat kebarangkalian beliau mungkin tidak berlaku saksama atau bebas (lihat perenggan 35).

(4) Perintah penguatkuasan boleh diketepikan kerana tindakan berterusan penimbang tara dalam kapasiti tersebut selepas menyedari tentang keadaan yang boleh membawa keadaan keraguan yang boleh menjustifikasikan kesaksamaan dan kebebasan beliau sememangnya adalah mengenai isu bidang kuasa yang tidak mencukupi. Keterangan baru tentang pelantikan beliau dalam MBB juga tidak diberikan kepada plaintif-plaintif apabila perintah penguatkuasaan dibuat (lihat perenggan 52–59).]

Notes

For cases on appointment, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1472–1483.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysia Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)
Dimes v Proprietors of Grand Junction Canal (1852) 3 HLC 759, HL (refd)
Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)
A Thai Company & Anor Government of the Lao People's Democratic Reepublic v Thai-Lao Lignite Co Ltd ('TLL'), A Thai Company and Anor [2011] MLJU 361; [2011] 1 LNS 401, HC (folld)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor [1999] 5 MLJ 137; [1999] 1 CLJ 632, HC (refd)
Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors [2010] 2 MLJ 661, CA (refd)
Osman Daud (trading under the name and style of RSZ Trading) v Asal Bina Sdn Bhd [2010] 9 MLJ 840, HC (refd)
R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256, KBD (refd)
Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, Interveners) [2000] 3 MLJ 201; [2000] 3 CLJ 16 (refd)
Sundra Rajoo v Mohamed Abd Majed & Anor [2011] 6 CLJ 923, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 13(8)(b), 14, 15, 15(5), 16, 32, 33, 37(1)(a)(iv), (1)(b), (2), (2)(a), (2)(b), (2)(b)(i), (2)(b)(ii), (4), (5), 39, 42(2), 50
Companies Act 1965 s 132(1)
Rules of the High Court 1980 O 3 r 5(1), O 20 r 11, O 69 r 4(1)(b), O 92 r 4

Atma Singh Veriah (DR John with him) (Atma Singh Veriah & Co) for the plaintiffs.
Mokhzani Harris (Aziz Hon Annuar) for the defendant.

Lee Swee Seng JC:

PROLOGUE

[1] The parties to this action have gone for arbitration to resolve their disputes arising out of a shareholders' agreement between the first plaintiff and the defendant and a water purchase agreement between the second plaintiff and the defendant. The sole arbitrator had prior to his appointment as an arbitrator to hear the dispute signed a statement of independence as required by the rules of the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'). The arbitration proceeded and on the advice of the arbitrator, agreed to enter into negotiation for a settlement and the parties then recorded a consent award before the arbitrator with a subsequent consent order on costs which the plaintiffs are required to pay the defendant. The plaintiffs were to later discover

A that the arbitrator, shortly after his appointment, had become a director of the bank that had financed the joint-venture between the parties. This however was not disclosed to the parties. The question raised is whether the award can be set aside for what the plaintiffs said is a breach of the rules of natural justice. There is the further question of whether the time frame of 90 days for applying to set B aside the award can be extended by the court and whether it is too late in the day to set aside the award as it has been registered already. These issues shall be explored in this judgment.

PARTIES

C

[2] The first plaintiff and the defendant had entered into a joint venture shareholders' agreement ('JVSA') dated 30 December 2003 to set up the second plaintiff, Kenyir One Sdn Bhd, a joint venture company for a Water Bottling Plant Project in Tasik Kenyir, Terengganu. The paid-up capital of the D second plaintiff is RM2m with the first plaintiff having a 70% equity and the defendant 30%.

[3] Pursuant to cl 5.3 of the JVSA, the second plaintiff as the vendor entered into a water purchase agreement dated 18 October 2004 with the defendant as E the purchaser wherein the second plaintiff agreed to sell and the defendant agreed to purchase bottled reverse osmosis water on the terms and conditions contained therein.

F **[4]** Financing for the second plaintiff is from Malayan Banking Bhd ('MBB'). The first plaintiff created a third party first legal charge over two pieces of vacant land in favour of MBB for a combined facility of RM2.3m. The first plaintiff also stood as a guarantor for the facility. There was a drawdown of the facility after the execution of the facilities agreement dated G 10 November 2004.

PROBLEM

[5] The plaintiffs claimed that the defendant was in breach of the water H purchase agreement when it failed to, inter alia, purchase the bottled water. The first plaintiff claimed for RM1,186,687.72 and the second plaintiff claimed for RM11,433,000 against the defendant. The dispute was referred for arbitration under the UNCITRAL Arbitration Rules as modified by the Rules of the KLRCA. The sole arbitrator signed a statement of independence dated 8 May I 2009 as required under the UNCITRAL Arbitration Rules before his appointment as an arbitrator. In the statement the arbitrator declared, inter alia, that:

(1) I am independent of the Parties and intend to remain so;

(2) To the best of my knowledge there are no facts or circumstances likely to give rise to justifiable doubts as to my impartiality or independence.

[6] For the purpose of the arbitration, the plaintiffs had filed all the facilities agreement with MBB in a non-agreed claimants' bundle of documents where MBB would be a witness in the said arbitration proceeding. The arbitration proceeded and the first plaintiff gave evidence and was cross-examined by the defendant's counsel.

[7] Mid-way through the arbitration, both parties on the advice of the arbitrator to negotiate a settlement, withdrew their claims against each other with liberty to file afresh. This was recorded as a consent award dated 2 April 2010 and by a subsequent consent order on costs dated 2 July 2010 the first plaintiff was ordered and directed to pay the defendant RM157,997.84 and the second plaintiff was ordered and directed to pay the defendant RM50,000 to be paid on or before 1 August 2010.

[8] Following that the plaintiffs said they made all attempts to seek a settlement through proposals, meeting and consultations but according to the plaintiffs, the defendant's attitude of not responding to the same led to a stalemate. The defendant however proceeded to file an application to enforce the consent order on costs made by the arbitrator and the registration and enforcement of the award on costs was made on 18 April 2011 in Originating Summons No D-22NCC(ARB)-3 of 2011.

[9] Unbeknown to the plaintiffs, mid-way through the arbitration proceeding and before the making of the aforesaid awards, the said arbitrator was appointed as a non-independent non-executive director and a member of the credit review committee of MBB on 22 July 2009. MBB is the financier for the second plaintiff with securities and guarantee furnished by the first plaintiff for the facility of RM2.3m to part finance the purchase of equipment and machinery for bottling and RO water treatment plant, preliminaries and mobilisation, purchase of foreign and local material and labeling.

[10] The plaintiffs only discovered this fact in September 2011. The first plaintiff then wrote by letter dated 15 September 2011 to the Chairman of MBB complaining that the said arbitrator had been made a Director of MBB since 22 July 2009 and the fact that the said arbitrator had not disclosed his new position as required under the statement of independence signed by the said arbitrator dated 8 May 2009. The first plaintiff had also in the said letter disclosed the fact that the outcome of the said arbitration was critical to his ability to pay the redemption sum demanded by the MBB management committee but unfortunately the arbitration had stalled. The defendant had proceeded further with a bankruptcy action against the first plaintiff for the

costs of RM157,997.84.

PRAYER

[11] The plaintiffs by this originating summons in encl 1 prayed for the following orders, inter alia:

(a) that leave be granted by the court for extension of time to set aside:

(i) the consent award dated 2 April 2010;

(ii) the consent award on costs dated 2 July 2010 both of which were in the matter of the arbitration between Dato' Dr Muhammad Ridzuan bin Mohd Salleh and Kenyir One Sdn Bhd as the claimants and Syarikat Terengganu Sdn Bhd as the respondent; and

(iii) The High Court enforcement order dated 18 April 2011 in Kuala Lumpur High Court Originating Summons No D-24NCC(ARB)-3 of 2011;

(b) and or the alternative the above three awards be set aside pursuant to s 37(5) of the Arbitration Act 2005.

[12] The plaintiffs' application was filed pursuant to ss 16, 32, 33, 39 and 50 of the Arbitration Act 2005 ('the Act').

PRINCIPLES

Whether the court has a discretion to extend time under s 37(4) of the Arbitration Act 2005

[13] Under s 37(1)(a)(vi) of the Act a party may apply to the High Court to set aside the award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act.

[14] Under s 37(1)(b) and (2) of the Act it is provided that:

(1) An award may be set aside by the High Court only if —

(b) the High Court finds that —

(i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia. A

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

(a) the making of the award was induced or affected by fraud or corruption; or B

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

C

[15] However, under s 37(4) of the Act specifically states, inter alia, as follows:

> An application for setting aside *may not be made after the expiry of ninety days* from the date on which the party making the application had received the award … (Emphasis added.) D

[16] It was submitted by the plaintiffs that this court has the discretion to extend time for the application to set aside an award beyond the 90 days period as the word used is 'may' and not 'shall'. I agree that there is a discernable E difference between a peremptory 'shall' and a permissive 'may'. The former is mandatory whereas the latter is not. The former takes away any discretion for extension of time for instance whereas the latter leaves some room for the exercise of discretion to extend time in the context of a time frame to do a particular act. Parliament could have used the word 'shall' if they had wanted to F as 'shall' is used in the context of a time frame to make an application in s 42(2) of the Act as follows:

> A reference *shall be filed within forty-two days* if the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds G on which the reference is sought. (Emphasis added.)

[17] I find support for the above position in the judgment of my learned brother Dr Hamid Sultan J in *"">"), A Thai Company & Anor""">Government of the Lao People's Democratic Reepublic v Thai-Lao Lignite Co Ltd ('TLL'), A Thai Company & Anor* [2011] MLJU 361; [2011] 1 LNS 401 where His Lordship H observed:

> [7] The issues for the determination of the court are as follows:
>
> (a) whether the court has power to grant an extension of time to set aside the award I pursuant to s 37(4) of the AA 2005 and/or any other law/its inherent jurisdiction; and
>
> (b) is this a case where the court ought to exercise its discretion in the plaintiffs favour.

A The submissions of the learned counsel can be summarised as follows:

(a) Section 37(4) of the AA 2005 provides that an application to set aside an award *may* not be made after expiry of ninety days from the date on which the party making the application had received the award. The provision is directory not mandatory with the use of the term 'may' enabling this court to exercise its B discretion in granting an extension of time;

(b) within the AA 2005, there is support for this legal proposition. Section 42(2) of the AA 2005 is couched in mandatory terms. It provides that 'a reference shall be filed within forty-two days of the publication and receipt of the award, and *shall* identify the question of law to be determined and state the grounds on which the C reference is sought'. This provision has been considered mandatory in the judgment in *Chip Lam Seng Bhd v R1 International Pte Ltd* [2010] 1 LNS 64, R3–24–30 of 2009 where the failure to comply with the 42 day timeline resulted in the application being dismissed;

(c) the provisions of s 37 are quite different. In s 37, the provision states that an D application to set aside the award may be made. This is similar to s 42(1) which provides that any party may refer a question of law to the High Court. The difference is seen in the provision stipulating the timeframe to make each of those applications. Section 37(4) provides that an application may not be made after 90 days. Section 42(2) provides that a reference shall be filed within 42 days. Hence there has to be a different approach in considering the two E provisions in view of the use of the directory 'may' in s 37 and the mandatory 'shall' in s 42;

(d) where the Act itself imposes a timeframe, the law gives the courts power to extend that time. The Schedule to the Courts of Judicature Act 1964 provides as F follows:

> 8 Time.
>
> Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed: Provided that this G provision shall be without prejudice to any written law relating to limitation.
> …

I agree with the plaintiff's contention that s 37(4) of the AA 2005 is directory and not mandatory, in a limited sense only. In the instant case there is nine month delay H and the grounds stated prima facie do not warrant the court to condone delay. The delay here is not 'just delay' but I will say inordinate delay as the plaintiff had adequate legal representation. This is not a case of nominal delay or situation where calamity such as tsunami has taken place for the court to exercise its inherent jurisdiction to condone delay even though limited discretion is vested pursuant to I various statute and/or rules of court.

[18] One may also argue that even under the previous Arbitration Act 1952 the provision with respect to the time-frame to set aside an award was governed by O 69 r 4(1)(b) of the Rules of the High Court 1980 ('RHC') which reads:

An application to the Court — A

(b) to set aside an award under section 24(2) of that Act or otherwise, *may be made at any time within 6 weeks* after the award has been made and published to the parties. (Emphasis added.)

B

[19] One is familiar with O 3 r 5(1) of the RHC which extends grace to those caught by strict time frames as follows:

The court may, on such terms as it thinks just, *by order extend or abridge the period within which a person is required or authorised by these rules* or by any judgment, order or direction, *to do any act in any proceedings.* (Emphasis added.) C

[20] The wisdom of the legislature is using the word 'may' in s 37(4) of the Act is to cater for a myriad of circumstances where the ground for setting aside an award only becomes apparent much later upon the discovery of what under the regime of the Arbitration Act 1952 is a possible misconduct or as in this case, some breaches of the rules of natural justice (s 37(2)(b)) as in the arbitrator being a Director of MBB that is the financier of the joint venture where the parties to the joint venture share agreement have submitted their claims to arbitration. Such a knowledge was not had earlier until September 2011 and as pointed out by learned counsel for the defendant there was a delay of some 480 days. D E

[21] Having held that the court retains some residue of discretion in extending the time for a party to file an application to set aside an award exceeding the 90 days time frame from the date the award is received, I shall now proceed to consider whether under the circumstances of the case, the court should exercise its discretion to extend time for the filing of this setting aside application and whether the consent award on costs should be set aside. F G

Whether extension of time should be granted for this application under s 37(1) and (2) of the Act and the award set aside

[22] I must look at the circumstances under which the fact of the directorship of the arbitrator came to be known to the plaintiffs. The first plaintiff stumbled upon the fact of the arbitrator being appointed to the Board of MBB from the website of the bank that had been exhibited. This was further confirmed from the SSM search on MBB which was also exhibited. H I

[23] The defendant is not disputing that the first plaintiff had so come to know of the arbitrator's appointment as a Director of Maybank. What they are disputing is that the fact of the arbitrator being appointed a Director of MBB did not in any way affect the award which in essence was a consent award for

both parties to withdraw their claims against each other and for the plaintiffs here as the claimants there in the arbitration to pay the defendant costs.

[24] To appreciate the need for and the importance of independence and impartiality on the part of an arbitrator in the conduct of the arbitral proceedings, one must refer to article 11 of the UNCITRAL Arbitration Rules wherein it is provided as follows:

> When a person is approached in connection with his or her appointment as an arbitrator, he or she shall *disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.* An arbitrator, *from time to time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties* and the other arbitrators unless they have already been informed by him or her of these circumstances. (Emphasis added.)

[25] The Act modeled as it is after the UNCITRAL Arbitration Rules has a similar provision in s 14. Article 12 (s 15 of the Act) deals with the right of a party to challenge the arbitrator's appointment if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. The challenge may go all the way up to the High Court from which no appeal shall lie (s 15(5)). Here in the arbitration clause the appointing authority was the Director of the KLRCA. Indeed Director of the KLRCA of the High Court, in appointing an arbitrator shall have due regard to, inter alia, under s 13(8)(b) other considerations that are likely to secure the appointment of an independent and impartial arbitrator.

[26] No one is quibbling over the fact that when the arbitrator signed the Statement of Independence he correctly stated his position as being independent in relation to the parties. That was in 8 May 2009 and his appointment as a Director of MBB was in 22 July 2009. On 29 July 2009 the arbitrator called for a preliminary meeting with parties and directions were given with respect to procedures and how the arbitration was to proceed. The trial started on 21 and 22 January 2010 at the KLRCA. It continued on 5 and 12 February 2010. A brief chronology of events could be found in exh MD5 in the affidavit in support of the plaintiffs.

[27] The arbitrator, not just at the commencement of the arbitration but also through the continuation of the arbitration proceeding up to its conclusion with the handing or recording of an award and indeed 'from time to time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose to the parties any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence'.

[28] In other words, the arbitrator has a continuing duty of disclosure until

the conclusion or termination of the arbitral proceedings to disclose any such circumstance. The appointment of the arbitrator as a Director of MBB who is the financier of the joint venture from which the dispute has arisen is certainly a matter for disclosure. All the more so when the plaintiffs are already in default with impending legal action by MBB.

[29] The plaintiffs have stated in their affidavit in support that had the arbitrator informed the parties of his appointment as a director, the plaintiffs would have objected to him continuing as the arbitrator and would not have consented to the consent awards as they are tainted. In para 7 of the plaintiffs' affidavit in support it was averred as follows:

> During the negotiations leading to the withdrawal of my claim with liberty to file afresh, the defendant's counterclaim and the payment of costs, the arbitrator had played a part in the same by giving advice on the withdrawal of the claim and the counterclaim and all the while this fact of his appointment was not disclosed by the arbitrator.

[30] The defendant's version was that the consent award and the award on costs were arrived at by consent of the parties and were recorded as such before the arbitrator who did not influence the parties at all. I take the view that there is no need to determine how much of what the arbitrator said went into influencing the plaintiffs to withdraw their action and to pay the defendant costs. The question that must be asked is: Should the arbitrator have disclosed his appointment as a director to the parties? The answer is a resounding 'Yes'! The bank may not be a party to the arbitration but the fact that the bank is a financier of the project is sufficient nexus constraining and indeed compelling disclosure. It is a nexus that raises the likelihood of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality and independence. What is important is how the parties and in this case, more particularly the plaintiffs would have perceived the impartiality and independence of the arbitrator. It is not for us to second guess whether or not the plaintiffs would have perceived it differently. It is often said that perception is reality and though that may not be true, it certainly cannot be brushed aside as being totally irrelevant or unreasonable. What is necessary to trigger disclosure is a mere 'justifiable doubt' and not a finding of the lack of impartiality and independence. Elsewhere the expression 'reasonable suspicion' is being used. In other words there is no need for certainty but a mere likelihood or justifiable doubt or reasonable suspicion as to a lack of impartiality or independence on the part of the arbitrator.

[31] The High Court has expounded this issue with clarity in the case of *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd &*

Anor [1999] 5 MLJ 137; [1999] 1 CLJ 632 where His Lordship Nik Hashim J (as he then was) when dealing with the Arbitration Act 1952 held at p 137–139 (MLJ); pp 633–634 (CLJ) that:

(1) Parties to an arbitration are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide. They are also entitled to expect from him a faithful, honest and disinterested decision. Lack of impartiality or bias will be a ground on which objection may be taken against an arbitrator. The arbitrator must not only be free from bias but there must not even be an appearance of bias.

(2) An arbitrator must always act judicially with as detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words used must always be measured and circumspect. He must rule only after hearing the parties. He must always maintain the dignity and impartiality of the appointment.

(3) The power of the High Court to give relief for leave to revoke the authority of the arbitrator where the arbitrator is not impartial is provided under s 25 of the Act. The meaning of the word 'impartial' in s 25(1) of the Act is not restricted to the relationship of the arbitrator to any subject referred.

(3a) If an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred.

(4) An arbitrator can be or perceived to be impartial arising out of his conduct or arising out of his racial prejudice.

(5) As to whether an arbitrator is deemed to be biased or not, the 'reasonable suspicion' test and the 'real likelihood' test are both accepted as being the law at present. The trend, however, is towards the application of the 'reasonable suspicion' test as in essence the 'reasonable suspicion' test seems to be somewhat broader that the 'real likelihood' test.

[32] His Lordship proceeded to set aside the interim award and to revoke the authority of the arbitrator.

[33] More recently His Lordship Dr Hamid Sultan J in *Sundra Rajoo v Mohamed Abd Majed & Anor* [2011] 6 CLJ 923 said at pp 929–930 made this pertinent observation:

> It is trite that the duty of arbitrators to disclose facts likely to be biased is well established jurisprudence in the international arena as well as in Malaysia and the court has a coercive power to revoke the authority of an arbitrator.

[34] The whole system and structure of arbitration flourish best when there is confidence and trust in the arbitrator as an impartial and independent adjudicator in handing down an award that is fair and just. Trust once lost is

difficult to restore. Arbitrators are drawn from a pool of professionals who are experts in their own particular field of expertise. They are people very much in the industry and unlike judges who have to resign from all directorships and involvement in businesses, professional bodies and associations upon assuming office, arbitrators have mainly both their feet planted in business, commerce and profession. They may have a past or present business relationship with the parties to the arbitration or have an interest in the outcome of the arbitration. Hence the need for a thorough, truthful and timely disclosure of any circumstance that may give rise to a 'justifiable doubt' as to their impartiality and independence. Like Caesar's wife, he or she must be above suspicion. It is said to be in breach of the rules of natural justice that a man is to be judge in his own cause, if such a disclosure is not made. It was said by Lord Campbell long ago in *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HLC 759 at p 793:

> No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but my Lords, it is of the last importance that the maxim that no man is to be judge in his own cause should be held sacred. *And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.*

[35] Human nature being what it is, the arbitrator would be most uncomfortable to have to decide on the claims of the parties for there is a natural tendency and a dangerous one at that, for him to gravitate towards a decision that would best promote the interest of the bank. Even if he is uninfluenced by it, the parties might not think so. What was not given to the parties and in this case more particularly the plaintiffs was that right to decide whether or not to challenge the arbitrator's continuing arbitration on ground that there is a likelihood that he may not be impartial or independent. Was that a consideration hovering over his mind when according to the plaintiffs, he had advised them to negotiate a settlement? Perhaps a settlement would best promote the interest of the bank on whose board he sits.

[36] The defendant contended that his appointment is merely as a non-independent non-executive director and as a member of the Credit Review Committee. Since he does not hold an executive position, his influence over decision-making in the bank would be minimal. But that is not the point. The Companies Act 1965 does not differentiate between executive and non-executive directors but only the nomenclature of 'director' who under s 132(1) of the Companies Act the same duty is exacted of them in that they shall at all times exercise their powers for a proper purpose and in good faith in the best interest of the company. It is not for anyone to second guess what his role in the Credit Review Committee would be and as to whether an application for further facilities from the plaintiffs would come within his portfolio of duties where review is concerned.

[37] Neither is the argument that the arbitrator is there on the Board of MBB as a nominee Director of Permodalan Nasional Bhd and that he only draws a director's fees help to distance him from a 'justifiable doubt as to his impartiality or independence'.

[38] It was also submitted by the defendant's counsel that there was nothing secret about the arbitrator being appointed as a Director of MBB as the relevant announcement would have been made to Bursa Malaysia. Whilst that may be so, it is not every one's knowledge unless one keeps a tap on the public announcements of Bursa Malaysia closely. It is certainly easier and expected of the arbitrator having come to this corporate position as a director of a bank to disclose this fact to the parties before him for them to weigh and consider this new element.

[39] It was submitted by learned counsel for the defendant that at the end of the day what was entered into was a consent award and a consent order on costs and that like all consent orders, it can only be set aside on ground of fraud, misrepresentation or coercion. In the case of *Osman Daud (trading under the name and style of RSZ Trading) v Asal Bina Sdn Bhd* [2010] 9 MLJ 840, the High Court held at pp 850–851 that:

> The terms of the *consent judgment* must be read and understood as it stands and the plaintiff *ought not to be allowed to add words or vary the terms* of the said consent judgment. It is trite law that a consent order is evidence of the contract between the parties and is binding on all the parties to the order. (Emphasis added.)

[40] Whilst that may be true, what we have here is a case of an arbitrator, who according to the plaintiffs, had advised them to negotiate a settlement. Whether and to what extent that is true is not as important as the fact that the arbitrator had not disclosed as soon as he was aware of, a circumstance that might cause a justifiable doubt to arise as to his impartiality or independence. That remains sacrosanct. As was said in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at p 259, 'It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. The waters of arbitration must always be kept clean and clear of any contamination that might colour it.

[41] Surely it must have crossed his mind that even if he should think he has no problem with the adjudication of the dispute and is confident of his own impartiality and independence, the parties before him might not be comfortable with that or might not think so and they are entitled to have a right to make a choice as to whether they want to continue the arbitration proceedings before him. The golden rule for an arbitrator caught in such a circumstance is 'When in doubt, disclose!'

[42] Under the circumstances recounted above and for the reasons given, both the awards are tainted, void and have to be set aside.

Whether the consent award on costs having been registered in the High Court can be subsequently set aside

[43] The defendant has submitted that the plaintiffs should appeal against the enforcement order and not apply for leave to set aside the said enforcement order and the consent award on costs dated 2 July 2010 on the grounds that court is functus officio and res judicata applies and that this court has no jurisdiction. It is admitted that the enforcement order dated 18 April 2011 had been drawn up and perfected and has become a final order.

[44] The defendant cited as authority the case of *Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors* [2010] 2 MLJ 661, where the Court of Appeal held that at p 662 as follows:

> Once the order of JC1 had been drawn up and perfected, it could not be altered, varied or set aside because the court was functus officio. In other words, having decided a question brought before JC1, JC1 saw functus officio and cannot review her own decision. JC2 too cannot review JC1's decision. The aggrieved party on receipt of the order of JC1 had a legal remedy. It was by way of filing an appeal to the Court of Appeal. JC2 had no jurisdiction to act as an appellate court to amend the order of JC1.

[45] The plaintiffs submitted that this court has the jurisdiction and power to set aside both the aforesaid award on costs and the enforcement order. The Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 has stated that an order cannot be altered, waived or set aside as the court has become functus officio and it has no jurisdiction to alter, very or set aside a final order.

[46] However, the court went on to hold that there are exceptions to it and in the following cases the court has the inherent jurisdiction to amend or set aside a final order. The exceptions are:

(a) under O 20 r 11 of the Rules of the High Court 1980 – the slip rule insofar as it is necessary to correct errors in expressing the intention of the court; and

(b) the order relates to a judgment in default or made in the absence of a party at the trial or hearing.

[47] Then in the Federal Court case of *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 the court added another category of cases to the aforesaid exception

list. These cases refer to orders that have been obtained in *breach of the rules of natural justice* as such orders are nullities and they can be successfully attacked in collateral proceedings ex debito justitae.

[48] His Lordship Abdoolcader J (as he then was) stated at p 39:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings: it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon-in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkenss v Bell's Asbestos and Engineering Ltd*, Lord Diplock LJ (now a law Lord) said (at p 736) that It has been long laid down that where an order is a nullity, a person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.
>
> *Where a decision is null by reason of want of jurisdiction, it cannot be cured by any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (to so), because he is at liberty to treat the 'act as void'.* (*Birmingham (Churchwardens and Overseers) v Shaw* (at p 880 per Denman CJ)). In *Barnard v National Dock Labour Board* it was said that, as a notice of suspension made by the local board was a nullity/ the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at p 34 per Singleton LJ). *Ridge v Baldwin* is to the same effect.
>
> Lord Denning said in *Director of Public Prosecutions v Head* (at p111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *Regina v Paddington Valuation Officer & Anor, Ex parte Peachey Property Corp Ltd* (No 2) (at p 402). The judgment of this court in *Pow Hing & Anor v Registrar of Titles, Malacca* refers (at p 157) to the decision of the House of Lords in *London & Clydeside Estates Ltd v Aberdeen District Council & Anor*. And a passage in the judgment of the Lord Chancellor, Lord Hailsham of St Marylebone (at p 189) where he refers to a spectrum of possibilities as the legal consequences of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequences and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own. (Emphasis added.)

[49] The Arbitration Act 2005 specifically spells out a breach of the rules of natural justice as a ground for the setting aside of any award made in and this is found in s 37(2)(a)(b)(i) and (ii) of the Act which reads as follows:

Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

[50] An award so made is said to be an award which is in conflict with the public policy of Malaysia and such an award may be set aside by the High Court on that ground.

[51] The plaintiffs submitted that the non-disclosure by the arbitrator of his appointment as a director and a member of the Credit Review Committee of MBB was a breach of the rules of natural justice which occurred during the arbitral proceedings and in connection with the making of the consent awards 2 April 2010 dated 2 July 2010 which said consent awards are thereby tainted and can be set aside by this court. The plaintiffs were deprived of their rights to ask the arbitrator to recuse himself or to challenge the said appointment under s 15 of the Act.

[52] The plaintiffs are also applying to set aside the awards under s 37(1)(vi) in that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. Here the 'tribunal' is a sole arbitrator and the agreement includes that the sole arbitrator be impartial and independent. His continuing to act as an arbitrator after becoming aware of a circumstance that may give rise to justifiable doubt as to his impartiality or independence goes to the very core of his appointment as an arbitrator and it thus strikes at the very issue of a lack of jurisdiction. Consequently, the enforcement order dated 18 April 2011 is also tainted.

[53] The plaintiffs also submitted that under O 92 r 4 of the RHC 1980 the court would have the power to set aside the enforcement order of another High Court. Order 92 r 4 of the RHC reads as follows:

Order 92 Rule 4 For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make an order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[54] In fact in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysia Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 the Federal Court extended the scope and extent of the inherent and discretionary jurisdiction of the court with

unlimited jurisdiction to set aside an earlier order in the following two circumstances:

(a) where the earlier order had contravened a substantive statutory prohibition so as to render the earlier order defective on the ground of illegality or lack of jurisdiction; and

(b) where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside.

[55] His Lordship Mohd Azmi FCJ said at p 409 (MLJ); 93 (CLJ) as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '… which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, *'save that specifically it includes orders that have been obtained in breach of rules of natural justice*' … (Emphasis added.)

[56] His Lordship Peh Swee Chin FCJ in the same case at pp 418–419 (MLJ); p 104 (CLJ) observed:

> The grounds referred to for setting aside a consent order of a judgement by consent are grounds which basically relate to consensus ad idem or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgement by consent is undoubtedly based on an agreement of both parties where consent to the agreement must or should have been free in the first place. If the agreement upon which a consent order or judgement by consent is based, is vitiated by any ground recognised in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration, (see *Huddesfield Banking Co v Henry Lister* [1895] 2 Ch 273 and the cases cited therein), then such a perfected consent order or judgement by consent could be set aside in a fresh action filed for

the purpose. *Grounds which would vitiate such free consent should also include misrepresentation, coercion, and undue influence and other grounds in equity.* (Emphasis added.)

[57] The Court of Appeal in *Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, Interveners)* [2000] 3 MLJ 201; [2000] 3 CLJ 16 reconfirmed the position taken in the above cases and stated at p 208 (MLJ); 24 (CLJ) through Her Ladyship Siti Norma Yaakob JCA (as she then was) that:

Under the aforesaid circumstances, a court is seised with the necessary jurisdiction to entertain an application to set aside the earlier order ex debito justitiae. *Expressed in another way there is no need to adopt the appeal procedure nor to file a fresh suit to set aside the defective order. That can be done in the same proceedings where the impeached order was granted and before the same judge or another judge with concurrent jurisdiction.* (Emphasis added.)

[58] Her Ladyship had earlier observed at p 207 (MLJ); 24 (CLJ) that:

… an aggrieved party can still impeach a regularly drawn up order but only in a fresh suit brought to attack the order on the grounds that such an order had been obtained by fraud or *that fresh evidence, not available at the trial or hearing, had since surfaced that may affect the order.* To this we like to add another situation *where a regularly obtained order can be questioned ie, where the order had been entered by consent.* Under those circumstances *the aggrieved party may institute fresh proceedings to attack the consent order.*

[59] In the present case the fact of the arbitrator having become a Director of MBB after the commencement of the arbitration was not known to the plaintiffs and was not made known to the plaintiffs. This fresh evidence was not available to the plaintiffs when the enforcement order was made on 18 April 2011. It was only available in September 2011 wherein the plaintiffs promptly filed the originating summons application to set aside the awards and the enforcement order on 24 October 2011.

[60] Having examined the above authorities I am persuaded that this is a fit and proper case where the enforcement order ought to be set aside. the plaintiffs had also as an alternative, applied under s 37(5) of the Act for the same reliefs. This provides that s 37(4) on the time frame of 90 days within which one must apply to set aside an award does not apply to an application on the ground that the award was induced or affected by fraud or corruption.

[61] I must say here that I find not a trace of evidence pointing even remotely towards that and I have no problem in dismissing that alternative ground on

which the application is based.

PRONOUNCEMENT

[62] Based on the principles and the position under the law as discussed I was constrained to allow the application in encl 1 to set aside both the awards and also the enforcement order.

[63] Each party shall bear its own costs as the non-disclosure was not attributable to either the plaintiffs or the defendant but to the arbitrator.

Awards and enforcement order set aside and each party ordered to bear their own costs.

Reported by Ashok Kumar